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No. 167

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In the Supreme Court of the United States

OCTOBER TERM, 1951

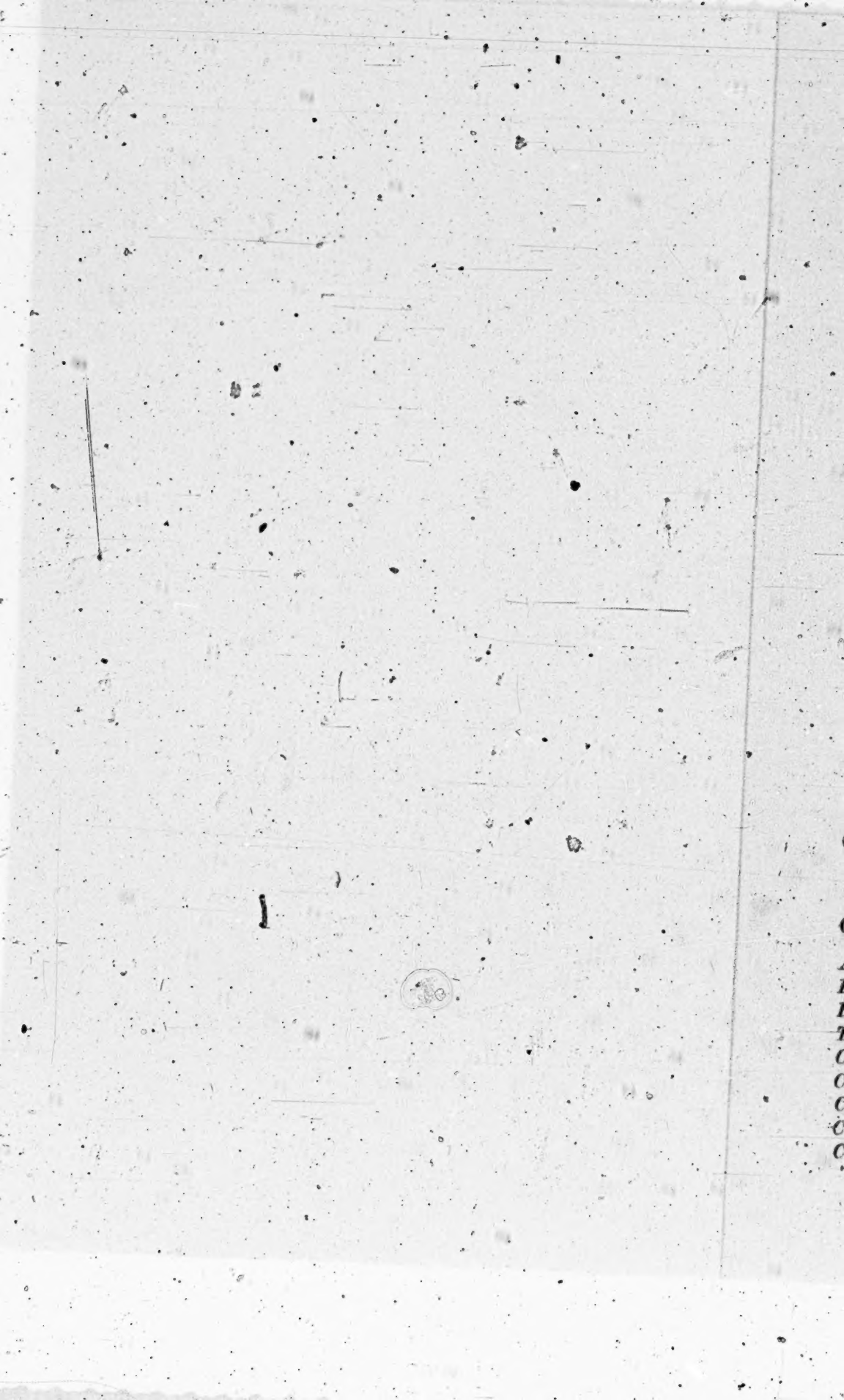
BOYCE MOTOR LINES, INC., PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES



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OPINIONS BELOW

The opinion of the Court of Appeals (R. 20-25) is reported at 188 F. 2d 889. The opinion of the District Court (R. 7-13) is reported at 90 F. Supp. 996.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1951 (R. 26). On May 25, 1951, the time for filing a petition for a writ of certiorari was extended by order of Justice Burton to and including July 2, 1951 (R. 28), and the petition

was filed on that date. The petition was granted on October 15, 1951 (R. 29). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

By regulation of the Interstate Commerce Commission, drivers of motor vehicles transporting certain dangerous substances, including inflammable liquids, are required to "avoid, so far as practicable, and, where feasible, by prearrangement of routes," driving through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." By 18 U.S.C. 835, whoever "knowingly violates" such a regulation is punishable. The question presented is whether an ascertainable standard of guilt is prescribed within the requirements of the Fifth and Sixth Amendments.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 835:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all ship-

pers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

The commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions.

Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.

Such regulations, as well as all changes or modifications thereof, shall, unless a shorter time is authorized by the commission, take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

In the execution of sections 831-835 of this title the Interstate Commerce Commission may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and may avail itself of the advice and assistance of any department, commission, or board of the Government; but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law.

Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any per-

son results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The pertinent regulation of the Interstate Commerce Commission is 49 C.F.R. (1949 ed.) 197.1 (b):

> Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.

STATEMENT

In an indictment returned by a grand jury for the District of New Jersey, petitioner was charged, in the three counts in question (counts 1, 3, and 5; R. 1-6), with having "unlawfully and knowingly" caused its driver, en route from Gascade Mills, New York, to Brooklyn, New York, to drive a truck containing carbon bisulphide, an inflammable liquid, "into the Holland Tunnel, a congested thoroughfare." The dates of the offenses were charged as on or about May 13, April 7, and April 8, 1949, respectively, and it was further charged that "there were other available and more practicable routes" and that petitioner "well knew that the transportation * * * into the said Holland Tunnel was in violation of the regulations." Count 1 also charged that on May 13, carbon bisulphide, of a gross weight

of 48,536 pounds, flamed and exploded in the Holland Tunnel while being transported on petitioner's truck, and that as a result of petitioner's violation bodily injuries were caused to approximately 60 persons.

The District Court issued an order dismissing the three counts (R. 13) on the ground that the regulation did not fix an ascertainable standard of guilt (R. 8-9). It found that intent was not made an element of the offense (R. 10). The Court of Appeals for the Third Circuit, in a unanimous decision, reversed (R. 26), holding that the regulation, read with the statute, requires a wrongful intent to evade the regulation (R. 22) and that, so construed, the regulation establishes a reasonably certain standard of guilt (R. 23-24).[1]

SUMMARY OF ARGUMENT

Petitioner asserts that the Interstate Commerce Commission's regulation governing the routing of motor vehicles transporting explosives, inflamma-

[1] The counts in question and the additional counts 2, 4, and 6, further charged operations without signs, marks, or placards on the vehicle, as required under Interstate Commerce Commission regulations in the case of dangerous shipments. The District Court found counts 1, 3, and 5 ambiguous by reason of the inclusion of charges as to the lack of markings (R. 11), but the Court of Appeals found that the additional charges constituted only surplusage of a non-prejudicial nature (R. 24-25). This matter was not raised in the petition for a writ of certiorari (see Pet. 5-6). Petitioner moved in the District Court for dismissal of counts 2, 4 and 6, which charged operations without the required markings. The District Court found the contention of ambiguity without merit as to these counts and denied the motion to dismiss as to them (R. 11-12).

ble liquids and other dangerous articles is rendered unconstitutionally vague and uncertain by the use of the phrases "so far as practicable", "where feasible", "congested thoroughfares, places where crowds are assembled" and "dangerous crossings."[2] We contend that the regulation clearly establishes an ascertainable standard of guilt satisfying the Fifth and Sixth Amendments.

I

The Transportation of Explosives Act of 1908 as amended, 18 U.S.C. 835, directs the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles including flammable liquids which will bind all carriers in interstate commerce. Pursuant to the statute, the commission promulgated regulations applicable to railroads in 1908 and to motor carriers in 1934 which, as amended, are in force today.

The 1934 regulations contained a provision

[2] The petition for certiorari relies only upon the phrases "so far as practicable" and "where feasible" as rendering the regulation unconstitutionally indefinite. Petitioner's brief asserts that similar uncertainty is injected into the regulation by the other phrases referred to above (Pet. br. pp. 15-17). In the following discussion, we show that the regulation is not rendered invalid because the carriers' duty to provide for the safe routing of explosives and inflammables is necessarily expressed in a general standard which employs the phrases "so far as practicable" and "where feasible". We believe that the same reasoning will support *a fortiori* the description of the places to be avoided by such meaningful phrases as "congested thoroughfares, places where crowds are assembled" and "dangerous crossings".

which directed drivers of vehicles containing explosives or inflammables to avoid congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings "as much as possible." In 1940, after extensive hearings and opportunity for all motor carriers to comment upon drafts, the regulations, including what was to become Section 197.1(b) were revised. That section was amended so as to direct drivers to avoid the places mentioned "as far as practicable" and to accomplish this "so far as practicabl " by prearrangement of routes. The regulation was amended to its present form in 1942. In this form, it has been apparently acceptable to the carriers until the present controversy arose.

II

The regulation here involved is sufficiently certain to meet the due process requirement that those affected know what acts are criminal.

The words "practicable" and "feasible" which are the principal basis of petitioner's criticism are defined in Webster's dictionary in such a way that they could not be ambiguous in the context of the regulation. The expression "so far as practicable, and, where feasible" clearly means "capable of being put into practice successfully or reasonably" or "capable of being used successfully or reasonably." In other words, the carriers

are to avoid the places mentioned when they can do this successfully or reasonably.

This definition is consistent with the prior decisions. Thus, in a statute which forbade the carrying of petroleum on passenger steamers unless there was "no other practicable mode of" transporting it, the word "practicable" was held to mean commercially rather than merely physically or mechanically practicable. *United States* v. *Wise*, 7 Fed. 190. And in *Sproles* v. *Binford*, 286 U.S. 374, 393, the term "shortest practicable route" was held to be sufficiently certain in the light of common usage and interpretation.

Upon examination, the supposed difficulty in making the judgments required by the regulation disappears. The carrier is required to study available routes before it uses them to transport explosives and inflammables. If there is more than one route, it must determine whether one avoids the places mentioned to a greater extent than the others. This is no more than a prudent carrier of dangerous articles would do in the absence of the regulation. Petitioner is required to make only the type of judgments that carriers and even ordinary drivers make every day.

III

A study of the numerous decisions which have dealt with the problem of vagueness in criminal statutes bears out the conclusion that the regu-

lation is sufficiently certain. These decisions show clearly that the possible existence of borderline cases will not make a law unconstitutionally indefinite, as petitioner contends. As the Court pointed out in *Jordan* v. *De George*, 341 U.S. 223, 231, it has "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." Petitioner's required determination was no more difficult than that required in numerous other cases, for example the determination of whether one's sheep interfere with the "usual and customary use of [a] range," or whether one is coercing an employer to employ more persons than "needed." There are countless statutes, both state and federal, which require that a line be drawn between innocent and criminal conduct without being deemed constitutionally objectionable.

There are special reasons why the requirement of certainty should be relaxed under the facts of this case. As the cases show, the standard of required certainty varies with the seriousness of the evil to be prevented. That this regulation is applicable only to a few members of a highly specialized group is also a factor to be considered.

Furthermore, impossible standards of specificity are never required. Because of the impossibility of drafting a regulation which would specifically

point out the routes to be used under a great variety of conditions, the Commission was required to establish a general standard which can be applied in all places and under all circumstances. Otherwise, the legislative purpose would be completely frustrated. By their nature, explosives and inflammables must be handled with extreme care. The regulations to assure this quite naturally and frequently use general terms such as "practicable," "all possible precautions," "safe distance." The experience of legislatures in dealing with the problem of the safe routing of explosives and inflammables confirms that the Commission's establishment of a general standard is probably the only feasible method of regulation.

IV

Any possibility of uncertainty is obviated by the fact that 18 U.S.C. 835 punishes only one who "knowingly violates" the regulation. The meaning of the word "knowingly" must be determined in the context used. We submit that where a criminal regulation requires investigation and judgment, it will be held to punish only wilful or negligent failure to consider the factor of safety. Conversely, it will not punish an honest error in judgment.

The vice of an indefinite statute is that it places the accused on trial for an offense the nature of

which the statute does not define and of which it gives no warning. But it is a contradiction in terms to say that the accused suffers from lack of warning when he "knowingly violates" a statute. This is borne out by the decisions of this Court which have consistently refused to hold a statute constitutionally uncertain where scienter has been an element of the offense.

ARGUMENT

I

The Regulation at Issue Evolved from Earlier Regulations Which Have Been in Force Since 1934 and Were Adopted After Consultation with Representatives of the Industry Involved

We need dwell but briefly upon the compelling reasons for regulating the transportation of explosives and inflammables. No one can doubt the seriousness of the hazards involved. E.g., see 7 F.R. 7043 (1942); *Hughes Transp., Inc. Extension-Southeastern States,* 46 M.C.C. 603 (1946). The exactions of war compound the problem since they necessitate an "extraordinary increase in the production of explosives and other dangerous articles" and force action "to promote the safety of interstate or foreign transportation, of those who are employed in the movement thereof, and of the public generally." 8 F.R. 6481-6482 (1943).

Congress early recognized the need for safeguarding the public against the hazards of trans-

porting explosives. The Act of July 3, 1866, prescribed the conditions under which specified explosives were to be shipped in vehicles and vessels engaged in interstate and foreign commerce, and prohibited shipments in passenger vehicles and vessels. 14 Stat. 81. The act proved inadequate in the light of later developments, and a number of serious disasters occurred. The American Railway Association (now Association of American Railroads) established a bureau of explosives, but, since not all railroads were members of the bureau, it was unable properly to cope with the situation. These chaotic conditions promoted the passage of the Transportation of Explosives Act of March 30, 1908. 35 Stat. 554, codified and amended by Act of March 4, 1909, 35 Stat. 1134. On March 4, 1921, the act, originally applicable only to explosives, was extended to inflammables. 41 Stat. 1444. See generally, *Interstate Commerce Commission Activities 1887-1937*, pp. 137-138.

The portion of the act applicable to the present case is now codified as 18 U.S.C. 835 and is quoted in full at pp. 2-4, *supra*. It directs the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles, including flammable liquids, to be binding on all land common carriers in interstate commerce. It further provides that whoever "knowingly violates" a regulation will be fined not more than $1,000 or imprisoned for not

more than one year or both. In the event that death or bodily injury results, the maximum penalties are $10,000 fine or ten years' imprisonment or both.

Pursuant to these statutes, the commission in 1908 promulgated regulations applicable to railroads (Interstate Commerce Commission, 22d Annual Rep., p. 56), which, as amended, have been in effect ever since. These are now published as 49 C.F.R. (1949 ed.) Pts. 71-78.

The commission early realized that the statutes governing transportation of explosives were broad enough to cover highway carriers. See *Coordination of Motor Transportation*, 182 I.C.C. 263, 370 (1932). But it was not until 1934 that regulations were promulgated governing motor trucks and similar vehicles. These regulations were issued after extensive hearings and widespread publicity throughout the motor transport industry. Proposed regulations were served upon each of 2300 motor carriers listed by the Federal Coordinator of Transportation and 205 other interested parties. Objections were heard and numerous changes made. Finally on November 6, 1934, the commission promulgated its first regulations for the transportation of explosives and other dangerous articles in interstate commerce by motor truck or other vehicle. 49 C.F.R. (1st ed.) Pt. 85; see *Regulations for Transportation of Explosives*, 211 I.C.C. 351, 354 (1935).

The predecessor to Section 197.1(b) (Section 85.34(b)) read at that time as follows:

> In transporting by motor truck or other vehicle any explosive, or any bulk shipment of inflammable liquid or corrosive liquid, all congested thoroughfares, places where crowds are assembled, street-car tracks, tunnels, viaducts, and dangerous crossings should be avoided as much as possible.

These regulations were modified on numerous occasions, but it was not until 1940 that a change was made which affected the text of the predecessors of Section 197.1(b). The 1940 change was a complete revision of all the regulations for motor transport of explosives and inflammables. Preparation and hearings for the change occupied over three years. A first draft was submitted to all motor carriers and other interested parties whose criticism was solicited. Some forty to fifty replies were received, many from groups or associations. The replies were annotated and used as the basis for revisions leading to a second draft. The second draft was also mailed to all motor carriers and interested parties. Sixty to seventy comments were received, and numerous conferences were held with the representatives of the carriers. As a result of the conferences and comments on the second draft, a third draft was formulated. This draft became the basis for extensive hearings held in Los Angeles, Tulsa, and Washington, D. C. 5

F.R. 1476-1477 (1940); *Motor Carrier Safety Regulations-Explosives, etc.*, 22 M.C.C. 477 (1940).

The predecessor to Section 197.1(b) was carefully considered in the course of the investigations. In the first draft it was Section 20 and read as follows:

> Motor vehicles transporting any explosives, or any bulk shipment of inflammable or corrosive liquids shall avoid, so far as possible, congested thoroughfares, places where crowds are assembled, street-car tracks, tunnels, viaducts, and dangerous crossings.

The circulation of the first draft to interested parties resulted in some criticism.[3] Vickers Petroleum Company, in a letter dated July 26, 1937, stated that it would be "practically impossible to comply with this ruling." Shell Petroleum Corporation of St. Louis, in a letter dated August 16, 1937, stated the regulation was unreasonable since it would be entirely possible to avoid the places mentioned, but only by driving many times the distance of the shortest route. Aetna Casualty & Surety Company, in a letter of July 28, 1937, suggested that the best feasible routes be pointed out to carriers as well as the best times of the day to drive. The remaining comments were irrelevant to the present problem, e.g., suggestions that the entire matter be left to local regulation or that the

[3] The information as to the extent to which the industry participated in the drafting has been obtained from the files of the Interstate Commerce Commission.

carrying of inflammables is not hazardous and should be omitted from the regulations.

The section was revised in the second draft to read as follows (Section 13C):

> Drivers of motor vehicles transporting inflammable liquids shall avoid, so far as practicable, congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. So far as possible, this shall be accomplished by prearrangement of routes.

Section 17B of the second draft was parallel except that the word "explosives" was substituted for "inflammable liquids." No comments as to either section as revised were received from interested parties.

The third draft contained the identical provisions renumbered as Section C-10 and Section B-18, respectively. At the hearings, the American Transit Association suggested that the word "possible" in Section C-10 be changed to "practicable." Two others suggested a change to recognize the good judgment of drivers. No relevant suggestions were made concerning Section B-18.[5]

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[4] Section 28 also used the word "possible" stating: "Wherever possible dangerous and less dangerous explosives shall be transported only during daylight hours." Of six comments received, one stated the rule was meaningless and the remainder objected to the substance of the regulation.

[5] Section 28, mentioned in note 4, *supra*, became Section B-24 and read: "Wherever possible dangerous and less dangerous explosives shall be transported only during the daylight and early morning hours." Numerous objections to the word "pos-

As a result of the hearings, Sections C-10 and B-18 were modified as suggested by the American Transit Association. The word "possible" in the second sentence became "practicable." Thus the regulation applicable to inflammables read (49 C.F.R. (1940 supp.) 197-7.3082):

> Drivers of motor vehicles transporting inflammable liquids shall avoid, so far as practicable, driving into or through congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts and dangerous crossings. So far as practicable, this shall be accomplished by prearrangement of routes.

The regulations have been amended on numerous occasions since 1940, but only one minor change was made in the section involved here. It was amended to its present form on April 7, 1942 (7 F.R. 2869, 2870), and now reads:

> Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts, and dangerous crossings.

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sible" were heard at the hearings, seven suggesting that it be changed to "practicable," and two suggesting a change to "practical." The American Transit Association explained that "practicable" was a better word for the reason that overnight runs are frequent in practice and that night transportation might be safer than day.

This history of Section 197.1(b) shows that the regulation was carefully drafted and has been in effect in one form or another since 1934. It shows that the carriers and their representatives were not only permitted, but were encouraged to participate extensively in drafting the regulation.[6] As a result of their representations, the word "possible" as it appeared in the original regulation became "practicable." With that change they were content, evidently feeling that the regulation was then reasonable and workable.

II

Section 197.1(b) Is Sufficiently Certain That Those Affected May Know What Acts Are Criminal

Section 197.1(b) requires drivers of motor vehicles transporting inflammables and other dangerous substances to avoid "so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." It must be read with 18 U.S.C. 835 which directs that the commission make regulations covering the transport of dangerous substances "binding upon all common carriers" and makes it a crime knowingly

[6] Under 18 U.S.C. 835, the commission of its own motion or on application of interested parties can modify the regulations. The regulations are constantly being modified, often as a result of the applications of the carriers themselves. See e.g. 6 F.R. 4373 (1941); *Regulations for Transportation of Explosives*, 211 I.C.C. 351 (1935).

to violate such a regulation. It must also be read with 49 C.F.R. (1949 ed.) 197.02, which provides:

> Every motor carrier and his or its officers, agents, employees, and representatives concerned with the transportation of explosives and other dangerous articles by motor vehicle, shall become conversant and comply with the regulations prescribed in this part [197]; and, to this end, each motor carrier shall instruct such persons.

The duty of the carrier itself to obey the regulation is thus made clear.

In positive language, the regulation directs drivers transporting inflammables and other dangerous substances to avoid the places mentioned. But the word "avoid" is qualified. It is qualified by the words "so far as practicable, and, where feasible, by prearrangement of routes." The principal contention of the petitioner is that the words "practicable" and "feasible" used in the regulation are uncertain. Petitioner professes to find it impossible to determine when it must avoid a congested thoroughfare or a tunnel.

In 49 C.F.R. 190.1(n) it is provided that any term not defined elsewhere, as used in the chapter "is used in its commonly accepted meaning." So we turn first to Webster (New Int. Dict., 2d ed.) for the meanings of the terms.

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[7] As codified the rule reads "as used in Parts 191-196," although, apparently "191-197" was intended. See 4 F.R. 2295 (1939). In any event, the principle stated by the rule should be applicable here.

Webster defines "practicable" as follows:

1. That may be practiced or performed; capable of being put into practice, done, or accomplished; feasible; as, a *practicable* method; a *practicable* aim; a *practicable* good.

2. Capable of being used; usable; as, a *practicable* weapon; specif., *Theat.*, that may be used as real, as a door.

3. Readily practiced on; gullible; pliant. *Slang.*

Syn.—PRACTICABLE, PRACTICAL are sometimes confused. That is PRACTICABLE (opposed to *impracticable*) which is capable of being accomplished; that is PRACTICAL (opposed to *theoretical* and the like) which can be actually turned to account.

Webster defines "feasible" thus:

1. Capable of being done, executed, or effected; possible of realization; as, your plan seems *feasible;* hence, successful in operation.

2. Capable of being managed, utilized, or dealt with successfully; suitable; as, to find Nice *feasible* for an invalid.

3. Likely; probable; reasonable.

Examination of these definitions makes it clear that they have definite and unambiguous meanings. "Practicable" means capable of being put into practice or used. "Feasible" has almost the same meaning except that it has the additional

concept of "successfully" or "reasonably." When then must the carrier avoid congested thoroughfares and tunnels by prearrangement of routes? Only, "so far as practicable, and, where feasible." In other words he must avoid congested thoroughfares and tunnels by prearrangement of routes when such a course of action is capable of being put into practice successfully and reasonably, or when such routes are capable of being used successfully and reasonably. Clearly if a carrier resorts to the dictionary he will have no trouble in finding out what the regulation requires.

"Practicable" alone in the context of Section 197.1(b) might possibly be construed to mean mechanically practicable. The word has often been used in the safety regulations to mean mechanical practicability. See, e.g., Sections 74.588 (a); 74.594(h); cf. 197.1(f). But used with "feasible" the additional requirement of successful operation comes into being.

The word "practicable" is not without a certain legal meaning in this and other contexts. It is significant that the word has been part of the statutory language in this field for more than 80 years.[8] It was formerly provided by the Act of February 28, 1871 (16 Stat. 441, as amended by 19 Stat. 252; 46 U.S.C. (1934 ed.) 465) that "Refined petroleum * * * may be carried on board such

[8] 18 U.S.C. 835 provides that the regulations must "be in accord with the best-known practicable means for securing safety in transit."

[passenger] steamers upon routes where there is no other practicable mode of transporting it, under such regulations as shall be prescribed by the board of supervising inspectors." In *United States* v. *Thornburg*, 6 Fed. 41, 42 (S.D. Ohio), affirmed *sub nom. United States* v. *Wise*, 7 Fed. 190 (C.C. S.D. Ohio), it was held that the trial court could charge: "If there be an all-rail route over which the oil may be carried with any profit, it is a practicable mode of transportation." The circuit court agreed that the word "practicable" means commercially rather than mechanically practicable. See also *The Benton*, 51 Fed. 302 (E.D. Mo.). We suggest that had the word "feasible" also been used in the above statute there never would have been any doubt that the word was used in the commercial sense to denote commercially successful operation.

This Court examined the meaning of the word "practicable" in *Sprole* v. *Binford*, 286 U. S. 374, 393. It stated:

> * * * "Shortest practicable route" is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest *possible* route, with-

out taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it.

The Third Circuit found no difficulty in interpreting a requirement that suitable provision be made outside railroad stations "when practicable" for the safe storage of explosives and that "every effort possible" be made to reduce the time of storage. This was a civil case where the plaintiff based his theory of negligence on alleged violations of regulations issued under the Transportation of Explosives Act. The court held that the regulation in context did not apply to explosives in carload lots. *Fidelity & Deposit Co.* v. *Lehigh Valley R. Co.*, 275 Fed. 922, 926.

We feel also that the history of the regulation is consistent with the meaning we have suggested for the words. Initially the places mentioned in the regulation were to be avoided "as much as possible." The first draft of the 1940 revision changed the qualification to "so far as possible." This was criticized as unreasonable, one critic pointing out that it would be "possible" to avoid the places mentioned but only by driving many times the distance of the shortest route. The word "practicable" was then substituted with no further objection. Thus, as in the *Sproles* case, *supra*, "practicable" was

used instead of "possible" to make the regulation workable.

Consider the problem of the motor carrier who desires to comply with Section 197.1(b). He is required to study available routes before he uses them to transport explosives and inflammables. If there is more than one route, he must determine whether one avoids the places mentioned to a greater extent than the others, and if so whether the safest route is also commercially feasible. At first sight, this may appear to require difficult value judgments. But in particular situations, the problem often becomes simplified. For example, there are many more or less direct routes between Detroit and points west which avoid Chicago. They may be congested, but are certainly less so than the routes through Chicago. The only judgment required as to whether such routes are commercially practicable is not too difficult a decision to make.[9]

If the only two routes between Jersey City and New York City were the congested Lincoln Tunnel and the congested Holland Tunnel, the judgment required by the regulation would not be difficult. He could use either route with impunity since he could not then avoid a congested thoroughfare, a tunnel or a viaduct. But assume that there is also in operation a special ferry which carries

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[9] Some companies find it practicable to avoid all towns of considerable size. *Regulations for Transportation of Explosives*, 211 I.C.C. 351, 352 (1935).

only trucks loaded with inflammables. Then he would be required to make a judgment as to the practicability of using the ferry. It is certainly not difficult for a carrier, with schedules, rates and routes of the ferry available, to determine whether use of a ferry is commercially practicable. And if a carrier can show that he honestly believed such route to be impracticable, then, as we discuss *infra*, he will be protected by reason of the fact that he can be punished only if he "knowingly violates" the regulation.

Petitioner clouds the issues at this stage of the case by suggesting (Pet. 7, Br. 11) that this Court take judicial notice that it is physically impossible for a truck to enter Brooklyn without "driving into or through 'congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts'." The indictment (R. 1-6) alleges in the counts at issue that petitioner "unlawfully and knowingly" did cause its driver to operate through a congested thoroughfare, that "there were other available and more practicable routes", and that the petitioner well knew that the "aforesaid" activities were in violation of Section 197.1(b). Under the familiar rule, facts as alleged in the indictment are admitted to be true for the purposes of this proceeding. Whether in fact alternative routes were available to the petitioner, and whether it was practicable and feasible for petitioner to use one of such alternative routes, are

issues which can be determined only by trial. At the trial, for example, it would be relevant for the government to show that the Delaware, Lackawanna and Western Railroad Company operates a special ferry between New York City and Hoboken for the transportation of motor trucks, tractors and semi-trailers handling inflammables. See I.C.C. No. 3681, Ferry Tariff No. 15, issued May 25, 1939, effective May 27, 1939, and supplements.

The regulation actually requires little more than responsible operation. The average driver frequently makes evaluations analogous to those required of the motor carrier under Section 197.1(b), and must base them upon much less information. It is not difficult for one en route from New York to Detroit via Canada to determine whether the extra miles it takes to avoid the congestion of Buffalo is practicable. It is not difficult for one en route from New York to Boston to determine whether the parkway system with its toll stations is more practicable than the old Post Road. It is unrealistic to claim that under the language of Section 197.1(b) a motor carrier would not know the kind of judgment he was called upon to exercise.

III

The Regulation Is Sufficiently Certain under Principles Established by Prior Decisions of This Court

This is but one of a long line of cases which have presented this Court with the problem of certainty

in criminal legislation.[10] The early statement of this rule was that if a statute was too vague for a man to know whether he had violated its prohibition, he was not within its terms. *United States* v. *Brewer*, 139 U.S. 278, 288. A later expression was that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. It is, however, far from easy to give the *Connally* rule definite content or specific application. As Justice Frankfurter, dissenting in *Winters* v. *New York*, 333 U.S. 507, 524, pointed out, indefiniteness "is itself an indefinite concept. There is no such thing as 'indefiniteness' in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained."

The process of matching words and phrases in statutes to determine whether one is as definite as another is difficult and to some extent inconclusive. Accordingly, we believe that the solution of each

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[10] Interestingly enough we can find but three cases (all state cases) in the past twenty years where this Court has struck down a statute or regulation on the ground of uncertainty. *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 242-243 (crime for oil producer to commit "economic waste" or to produce in excess of "reasonable market demands"); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (crime to be "member of any gang" under specified conditions); *Winters* v. *New York*, 333 U.S. 507 (crime to handle publication "principally made up of" criminal news and stories).

case must be a judgment based largely upon the text of the particular law in the context of the subject matter with which it deals. However, viewed as a whole, the cases contain underlying principles which we think clearly support the validity of the regulation here involved.

A. *The possible existence of borderline cases does not make a law unconstitutionally indefinite.* Petitioner contends (Pet. 11, Br. 12-13) that the statement in the court below that "individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternate route may differ from the view of the jury which tries him" (R. 23) brings Section 197.1(b) squarely within the doctrine of the *Connally* case. Few criminal provisions would be constitutional if they were to be condemned merely because in some borderline cases a person could not be certain as to what a court and jury would decide. Petitioner has failed to consider that in many cases since *Connally* this Court has made it clear that the possible existence of borderline cases does not make a law unconstitutionally indefinite. Thus, in *Robinson v. United States*, 324 U. S. 282, 286, a case involving a death sentence, the Court pointed out that "In most English words and phrases there lurk uncertainties." This Court held, however, that nullification of the clearly expressed purpose of Congress

was not justified "because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise." And in *Jordan* v. *De George*, 341 U.S. 223, 231, the Court declared that it has "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."

Justice Holmes, as spokesman for the Court, dealt with the problem upon several occasions. In *Nash* v. *United States*, 229 U.S. 373, 377, he made the oft-quoted statement that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." Later, he maintained that his view in the *Nash* case was consistent with his position in *International Harvester* v. *Kentucky*, 234 U.S. 216, 223, stating that "a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade." The *Nash* case he explained "goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a

line in advance without an artificial simplification that would be unjust."

Finally, in *United States* v. *Wurzbach*, 280 U.S. 396, 399, he stated in words quite suitable to the present facts:

> * * * we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

A similar view was expressed in *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502 where it is stated: "If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite."

The more recent cases are replete with similar expressions. Thus, in *United States* v. *Ragen*, 314 U.S. 513, 523, this Court held that the "mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." And in *United States* v. *Petrillo*, 332 U.S. 1, 6, this Court said: "as respondent points out, there are many factors that might be considered in de-

termining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes."

The petitioner was required to make two determinations: was there a route which made it possible to avoid "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." If so, was the alternate route "practicable" and "feasible". We submit that this decision is considerably easier to make than: whether sound trucks are "loud and raucous" (*Kovacs* v. *Cooper*, 336 U.S. 77, 79); whether competitive activities are "fair and open" (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183); whether sheep are interfering with the "usual and customary" use of a range (*Omaechevarria* v. *Idaho*, 246 U.S. 343, 348); whether activities are "reasonably calculated" or "tend" to fix prices (*Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86); whether a fire is "near" the public domain (*United States* v. *Alford*, 274 U.S. 264); whether income tax deductions are for "a reasonable allowance for salaries or other compensation for personal services actually rendered" (*United States* v. *Ragen*, 314 U.S. 513); or, whether one is coercing an employer to employ persons in excess of the number "needed" (*United States* v. *Petrillo*, 332 U.S. 1). Yet men can constitutionally be required to make all of these decisions.

Certainly in applying Section 197.1(b) there is no more risk that a judge or jury may disagree with the defendant's judgment than a requirement that in case of fire hotel keepers "do all in their power" to save their guests. *Miller* v. *Strahl*, 239 U.S. 426, 434; and see *Whitney* v. *California*, 274 U.S. 357, 368-369; *Communications Ass'n* v. *Douds*, 339 U.S. 382, 412.

There are countless state criminal statutes which require that a line be drawn between criminal (or analogous) and innocent conduct, and which require defendant, judge and jury to make difficult judgments. E.g. *Aiton* v. *Board of Medical Examiners*, 13 Ariz. 354 (1911) (revocation of physician's license for "unprofessional conduct"); *Ex parte Daniels*, 183 Cal. 636 (1920) (driving faster than "reasonable and proper"); *Hunt* v. *State*, 195 Ind. 585 (1924) (hauling when road "by reason of wet weather is in condition to be cut up and injured"); *Bailey* v. *Commonwealth*, 235 Ky. 173 (1930) (failure to provide "suitable and proper" washrooms); *People* v. *Thompson*, 259 Mich. 109 (1932) (failure to render "reasonable assistance" after accident); *State* v. *Graham*, 176 Minn. 164 (1929) (driving "under the influence of intoxicating liquor"); *State* v. *Bailey*, 115 Ore. 428 (1925) (failure to support "without just or sufficient cause"); *Com. ex rel. Woodruff* v. *American Baseball Club of Phila.*, 299 Pa. 136 (1927) (performing "worldly employment or business" on Sunday).

A rather close analogy to the present regulation is found in the state criminal negligence statutes. See, generally, *People* v. *Angelo*, 246 N. Y. 451; Riesenfeld, *Negligent Homicide* (1936), 25 Cal. L. R. 1. Such statutes have been upheld repeatedly against contentions that they were unconstitutionally vague and indefinite. *State* v. *Magaha*, 182 Md. 122, 32 A. 2d 477; *State* v. *Bolsinger*, 221 Minn. 154. When this Court was confronted with an Oregon statute which made criminal the driving of a motor vehicle "at a rate of speed that will endanger the property of another, or the life or limb of any person," it sustained a conviction per curiam on the authority of *Nash* v. *United States*, *supra*. *Miller* v. *Oregon*, 273 U.S. 657. During the same term of court, Chief Justice Taft, speaking for the Court in *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 465, characterized the result in *Miller* v. *Oregon* with the statement that "Such standard for the driver of an automobile on a highway is one to which it is neither harsh nor abitrary to hold those criminally who operate such a possibly dangerous instrument of locomotion, and who are or ought to be aware of what degree of care is necessary to avoid injury to others under the conditions that prevail on a highway." The regulation here involved is far short of a general criminal negligence statute; rather, it in effect applies the concept of criminal negligence to the single factor of route selection in the transportation of

explosives and inflammables. *A fortiori,* it is sufficiently definite.

We conclude from our examination of the cases that a statute will not be found constitutionally indefinite because of the possibility of doubt in peripheral cases. If there is a hard core of circumstances to which the regulation will apply and if this constitutes the mass of situations with which the regulation deals, constitutional requirements are fulfilled. Even apart from the additional protection afforded by the requirement that the regulation be knowingly violated for the conduct to be criminal, Section 197.1(b) is such a regulation.

Regulation Section 197.1(b) is not even designed to reach borderline cases. It requires the avoidance "so far as practicable, and, where feasible, by prearrangement" of congested routes and the other places mentioned. If all available routes are congested there would be no problem of choice. Necessity of a judgment as to practicability comes only when one is congested and another is not. Certainly there is a hard core of circumstances in which the judgment required by the regulation is clear and definite. Tunnels and viaducts are to be avoided so far as practicable. As between the Lincoln Tunnel and the Holland Tunnel no choice is required. But both are to be avoided if practicable, which might be the case if there is an available ferry.

If peripheral cases conceivably may arise, if

this particular case should turn out to be a peripheral case, petitioners are not without remedies. If after refinement of pleadings, presentation of evidence, the tendering of precise instructions for the jury, the verdict, the denial of a new trial, a peripheral case is decided against a defendant, he still is not deprived of constitutional rights. He may argue that because of the uncertainty under the particular facts the regulation was unconstitutional as applied. See *Herndon* v. *Lowry*, 301 U.S. 242; *Smith* v. *Cahoon*, 283 U.S. 553. He may contend that his acts did not fall within the intended prohibition of the regulation. *Kraus & Bros.* v. *United States*, 327 U.S. 614; cf. ground of concurrence of Justices Holmes and Brandeis in *Connally* v. *General Const. Co.*, 269 U.S. 385, 396; concurring opinion of Justice Pitney (joined by Justice Brandeis) in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 93). The possibility of a difficult, or even an erroneous, application to a particular set of facts does not render the regulation invalid as generally applied.

B. *The seriousness of the problem with which the regulation deals and its limited applicability to a specialized group are additional reasons for imposing the burden of the regulation upon carriers.* "Motor carriers of dangerous explosives owe a special duty to the public, and must be taken to have assumed a higher degree of responsibility than carriers of general commodities, to the end

that ample protection will be afforded the public." *Hughes Transportation, Inc., Extension-Southeastern States,* 46 M.C.C. 603, 620 (1946); cf. *Folker Extension of Operations-Coal,* 34 M.C.C. 449, 452 (1942). No one can deny the risk. We suggest that in the light of the seriousness of the problem, the fact that Section 197.1(b) may require some defendants to make difficult judgments will not render the regulation unconstitutional.

That the standard of required certainty may vary with the seriousness of the evil to be prevented was made clear by the Court, speaking through Justice Holmes, in *United States* v. *Alford,* 274 U.S. 264, 267, where it was held that a statute was not unconstitutionally vague which made it a crime to build a fire "in or near" forests or other inflammable material in the public domain. The Court declared: "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law." It is significant that petitioner has pointed to no case involving a dangerous business where this Court has held a statute or regulation to be unconstitutionally vague.

By engaging in the business of transporting inflammables petitioner asserted an honest purpose to carry on his operations in such a manner as to safeguard the public so far as practicable. The statute requires no more. Cf. *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501-502. Cer-

tainly he "who assumes duties may be required to perform them" and when petitioner entered this dangerous enterprise it "undertook its obligations." Cf. *Miller* v. *Strahl*, 239 U.S. 426, 432. We are certain that those familiar with the business of transporting inflammables by truck "will have little difficulty in determining what is prohibited" by Section 197.1(b). Cf. *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348. Persons in the class of petitioner could have discovered their duty, and that is the most that due process requires.

The regulation questioned here is applicable to a relatively limited group—motor carriers of explosives and inflammables. It requires that members of this group look for routes which are uncongested and avoid tunnels and viaducts. When such alternate routes are available they must determine whether they are practicable before they can use routes which are congested or pass through the other places mentioned. Motor carriers are experts in searching out routes and in determining their practicability. This regulation should be sufficient to guide them in exercising the judgment required.

The requirement of the *Connally* case is not that a statute be clear to ordinary men. It must be sufficiently explicit to inform those "who are subject to it," what conduct on their part will render them liable to its penalties. 269 U.S. at 391; *Kay* v. *United States*, 303 U.S. 1, 9. The Court suggested

this same principle in *Kovacs* v. *Cooper*, 336 U.S. 77, 79, when it pointed out that while "loud and raucous" are abstract words, they have acquired a content that conveys to "any interested person" a sufficiently accurate concept of what is forbidden.

C. *The impossibility of drafting a more precise provision is to be taken into account in determining whether Section [illegible].1(b) is sufficiently definite.* This Court point out in *United States* v. *Petrillo*, 332 U.S. 1, 7-8, that "the Constitution does not require impossible standards," and in *Jordan* v. *De George*, 341 U.S. 223, 231 that "Impossible standards of specificity are not required." Certainly the Commission is not required to define all the specific instances to be brought within a regulation. Cf. *Balt. & Ohio R.R.* v. *Int. Com. Comm.*, 221 U.S. 612, 620. As Justice Frankfurter suggested in his dissent in *Winters* v. *New York*, 333 U.S. 507, 525, "the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied."

Explosive and inflammable commodities are carried by many routes all over the country. The Commission cannot successfully regulate the transportation and shipment of explosives if general terms cannot be used. It would be utterly impossible to cover the entire United States in a regulation specifying all places, routes and localities

through or by which explosives, inflammables and similar articles may or may not be transported. The only practical way for the Commission to carry out its statutory duty is to require the carriers to utilize their knowledge and intelligence. In its regulations governing the transport of explosives and inflammables, the Commission has frequently made use of generic terms. Thus the regulations frequently use such terms as "careful men", "all possible precautions", "safe place", "more force than is necessary", "probable danger", "safe distance", "when necessary", "when possible", and "except in case of emergency." E.g. 49 C.F.R. (1949 ed.) 74.586(c)(e), 74.589(c)(e), 74.594(e)(g), 77.835(j). As a matter of fact they frequently make use of the word "practicable." E.g. 49 C.F.R. (1949 ed.) 74.577(a), 74.587(a), 74.588(a)(f), 74.594(h), 74.598(a), 77.835(j), 77.855(a)(c), 77.856(d), 77.857(a). If Section 197.1(b) is held to be uncertain, so are these and many other regulations which have worked successfully since 1908. The use of general terms is inevitable if power to safeguard the public and employees in this field is not to be denied. In *Balt. & Ohio R. R. v. Int. Com. Comm.*, 221 U.S. 612, 620, a statute provided that specified classes of employees were not to work more than nine of any twenty-four hours "except in case of emergency." In answer to the uncertainty argument, the Court said:

> * * * But this argument in substance denies to the legislature the power to use a generic description, and if pressed to its logical con-

clusion would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged.

In this connection it is significant that, both before and after the accident referred to in Count 1 of the indictment in this case, the legislatures of New York and New Jersey, in dealing with the problem of routing dangerous articles, were apparently unable to formulate rules more precise than the regulation here involved. Thus, a 1941 New Jersey statute provides that, "The operator of a vehicle transporting explosives shall avoid, *wherever possible*, those streets that are congested, or where there is a large number of persons, or where there exists a subway or elevated route" (emphasis supplied).[11] In 1951, the New York legislature provided that, "It shall be unlawful to transport by motor vehicle over the highways within this state any dangerous article in such manner or condition as will unreasonably endanger the person or property of others."[12] Also, when New York and New Jersey in 1950 enacted identi-

[11] 21 N. J. S. A. 1A-96.

[12] N. Y. Vehicle and Traffic Law, sec. 16-c.

"Flammable liquids" means "any liquid which gives off flammable vapors * * * at or below a temperature of eighty degrees fahrenheit."

cal amendments to their statutes relating to the Hudson River bridges and tunnels operated by the Port of New York Authority, they provided that "No person shall transport in or upon a vehicular crossing, any * * * inflammable or combustible liquids, * * * at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property."[13] Canada, by regulations the violation of which is made criminal, has provided that "a person in charge of a carriage or boat conveying explosives shall not delay for a longer time than may be reasonably necessary, nor stop unnecessarily at any place where such stopping would be attended with special public danger, and shall as far as possible select a route avoiding centres of habitation."[14] Thus, legislatures which have dealt with the problem, like the Interstate Commerce Commission, have been unable to treat the problem of routing explosives and other dangerous commodities otherwise than in terms of a standard of responsible judgment.

IV

The Regulation Is Given Certainty by Reason of the Fact That Only One Who "Knowingly Violates" It Can Be Punished

We submit that when Section 197.1(b) is read with 18 U.S.C. 835, which permits the punishment

[13] N. Y. Unconsolidated Laws, sec. 6508; 32 N. J. S. A. 1-154.8.

[14] Statutes of Canada, 1946, ch. 7, secs. 4, 24; 2 Statutory Orders and Regulations (Canada) Consol., 1949, p. 1270.

only of one who "knowingly violates" it, the constitutional objection must disappear. We contend that the words "knowingly violates" will permit punishment only for a wilful or reckless failure to consider the factor of safety in the selection of a route for the motor transport of explosives and inflammables. Conversely there can be no punishment for honest errors in judgment.

"Knowingly" is a word of differing meanings depending on the context in which it is used. We do not suggest that "knowingly violates" as used in 18 U. S. C. 835 should always be construed to require more than a mere intent to do an act prohibited by the regulations. For example, compliance with Section 197.1(e), which prohibits smoking while driving a truck containing explosives or inflammables, would involve no exercise in judgment; one would "knowingly violate" the regulation merely by deliberately engaging in the prohibited conduct. However, where compliance with a regulation requires the exercise of judgment or the weighing of facts, "knowingly" implicitly means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct. If a motor carrier determines, within the limits of a judgment made in good faith, that there is no alternate route which avoids tunnels, bridges, congested thoroughfares and crowded places, or that such an

alternate route is not practicable and feasible, he does not knowingly violate the regulation. Under the statute and regulation as read together and applied in the indictment, only the failure to utilize a route (1) which avoids the specified places substantially more than does the route which actually was used, and (2) which is commercially feasible for the carrier to use, can subject the carrier to criminal liability.

In *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 71-72, this Court was required to interpret a statute which created personal liability for directors of national banking associations who "knowingly violate" a requirement that no loan to a person exceed one-tenth of the capital and surplus of the association. Revised Statutes, Sections 5200, 5239, now 12 U. S. C. 84, 93. The Court held that in addition to a showing that the regulation was violated, there must be proof "that defendant, while a director, participated in or assented to the excessive loan or loans not through mere negligence but knowingly and in effect intentionally, * * *; with this qualification, that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as 'in effect intentional'." [15] We feel that the principle of the *Corsi-*

[15] See also *United States* v. *Starkey*, 52 F. Supp. 1, 2 (E.D. Ill.) where the crime was "knowingly" violating a statute prohibiting the transportation of diseased livestock. The court held that the statutory language required the exercise

cana case is applicable to a criminal regulation which, like the present one, requires investigation and judgment. Here, the word "knowingly" restricts criminal liability to those who fail to consider in good faith the factor of safety in routing dangerous commodities.

Once it is agreed that something approaching intentional violation or reckless disregard of consequences is required for the criminal sanctions to come into play, the infirmity of the constitutional objections to the regulation is manifest. This Court has consistently attached great significance to the existence of scienter where a question of certainty is raised. In no case where scienter has been an element of an offense has the court held a statute void for indefiniteness.[16] On the contrary, the Court has remarked that "whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the effect upon them and their business, of a wrong conclusion * * * since they are not required to act at their peril but only to exercise their judgment in good faith, in order

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of "the reasonable care of a reasonably prudent dealer" in livestock, remarking that the "word 'knowingly' in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware he can not lawfully do the act with which he is charged."

[16] Intent was no part of the clauses under attack in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. And the statutes held invalid in *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, and *Collins* v. *Kentucky*, 234 U.S. 634, had been construed by the state court to make combinations unlawful if they were either "for the purpose or with the effect of" fixing prices greater than the real value of the article.

to avoid coming into conflict with the statutes." *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413, this Court noted that "since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." This same language had been used in *Screws* v. *United States*, 325 U. S. 91, 101-102, where the Court ruled that "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." Compare *Gorin* v. *United States*, 312 U. S. 19, 27-28; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

This line of cases is entirely consistent with the *Connally* rule. The vice of an indefinite statute is that it places the accused on trial for an offense which the statute does not define and of which it gives no warning. But where the punishment is imposed only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot possibly be said to have suffered from lack of warning.

The regulation here involved has a meaning which, even apart from scienter, normal persons—

and certainly persons in the motor transport industry—would understand and have no difficulty of applying except in remotely possible borderline cases. No one can be punished for honest mistakes in close cases, since the statute limits criminal liability to those whose failure to consider the factor of safety in routing dangerous commodities reflects at least a reckless disregard of consequences.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be affirmed.

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